LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 18 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 514

HENRY THOMAS BAILEY,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Cuyahoga County, Ohio,
Eighth Judicial District of Ohio.

M. I. NURENBERG,
Counsel for Petitioner.

M. L. HELLER,
DUDNIK, KOMITO, NURENBERG, PLEVIN,
DEMPSEY AND JACOBSON,
714 Engineers Building,
Cleveland, Ohio 44114,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

TABLE OF CONTENTS.

Opinions by Courts Below ---- 1
Jurisdiction of This Court ---- 3
Questions Presented For Review ---- 3
Statutes Involved ---- 4
Statement of the Case ---- 4
Statement of Facts and Evidence ---- 6
Argument ---- 9
Summary ---- 9
Questions 1 and 2 ---- 9
Questions 3 and 4 ---- 13
Question 5 ---- 23
Conclusion ---- 24
Relief Prayed For ---- 25
Appendices:
A. Memorandum to Counsel by Lower Court ---- 26
B. Journal Entry of the Court of Appeals ---- 36
C. Statutes Involved ---- 37
D. Petition ---- 38
E. Answer to Petition ---- 41
F. Reply ---- 42
G. Answers to Plaintiff's Interrogatories ---- 44

TABLE OF AUTHORITIES.

Cases.

Affolder vs. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683 ---- 10

Allen vs. St. Louis-San Francisco R. R. Co., 297 S. W. 2d 49 (1962) ---- 22

Bailey vs. Central Railway Co., 319 U. S. 350, 63 S. Ct. 1062 (1943) ---- 9, 23

B. & O. Railway Co. vs. Flechtner, 300 F. 218 (1924) 16

Baltimore & Ohio R. R. Co., vs. Kast, 299 F. 419 (CA 6, 1924) Cert. denied 266 U. S. 613, 45 S. Ct. 95, 69 L. Ed. 468 ---- 16

Baltimore & Ohio Railroad Co. vs. O'Neil, 211 F. 2d 190 (CA 6, 1954) ---- 17

Basham vs. Pennsylvania Railroad Co., 83 S. Ct. 965 (1963) ---- 10, 11

Benner vs. Terminal R. Association, 348 Mo. 928, 156 S. W. 2d 657, Cert. denied 315 U. S. 813, 62 S. Ct. 798 ---- 19

Blair vs. B. & O. Railway Co., 232 U. S. 600, 650 S. Ct. 545 (1945) ---- 23

Carney vs. Pittsburgh & Lake Erie Railroad Co., 316 F. 2d 277 (1963) ---- 12

Carpenter vs. Baltimore & Ohio R. R. Co., 109 F. 2d 375 (CA 6, 1940) 16, 17

Carter vs. St. Andrews Bay R. Co., 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236 ---- 10

Coray vs. Sou. Pac. R. Co., 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208 ---- 10

Chesapeake & Ohio R. R. Co. vs. Smith, 42 F. 2d 111 (CA 6, 1930), Cert. denied 282 U. S. 856, 51 S. Ct. 32 ---- 16

Cuyahoga River Power Company vs. Northern Realty Company, 244 U. S. 300, 37 S. Ct. 653 2

Dennis vs. Denver & R. G. W. R. Co., 84 S. Ct. 291 ..... 10, 23-24

Didinger vs. Pa. R. R. Co., 39 F. 2d 798 (CA 6, 1930) 16

Fassbinder vs. Pennsylvania R. R. Co., 322 F. 2d 859 (3rd Circuit of Pennsylvania, 1963) 14, 18, 19

Gallick vs. The Baltimore & Ohio Railroad Co., 372 U. S. 108, 9 L. Ed. 2d 618 (1963) 10

Gulf, Colorado & Santa Fe Railway Co. vs. Deen, 353 U. S. 925, 77 S. Ct. 678 (1957) 24

Herdman vs. Pennsylvania Railroad Co., 352 U. S. 518, 77 S. Ct. 4455 (1957) 21

Jesenowski vs. Boston & Maine Railroad Co., 1947, 329 U. S. 452, 67 S. Ct. 401 ..... 19, 22

Lavender vs. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 10

Lowery vs. Hocking Valley R. R. Co., 60 F. 2d 78 (CA 6, 1932) 16

Marquadt vs. Kansas City Southern Railway Co., 358 S. W. 2d 49 (1962) 22

McBride vs. Toledo-Terminal Railroad Co., 354 U. S. 517, 77 S. Ct. 1398 (1957) 23

Meeks vs. Georgia Southern & Florida Railway Co., 108 Ga. App. 808 10

Miller vs. Cincinnati, N. O. T. Pacific Railroad Co., 317 F. 2d 693 (6th Circuit of Ohio, 1963) 14, 15, 16, 17, 18

Minneapolis & St. Louis R. R. Co. vs. Gotschall, 244 U. S. 66, 27 S. Ct. 598 (1917) 19

Nashville C. & St. L. Railroad Co. vs. York, 127 F. 2d 606 (CA 6, 1942) 16

O'Neil vs. Baltimore & Ohio Railroad Co., 348 U. S. 956, 75 S. Ct. 447 ---------- 17, 18, 19

Panhandle & Sante Fe Railroad Co. vs. Arnold, 353 U. S. 360, 77 S. Ct. 840 (1957) ---------- 24

Rogers vs. Missouri Pacific R. R. Co., 352 U. S. 500, 77 S. Ct. 443 (1957) ---------- 10, 24

Schulz vs. Pennsylvania Railroad Co., 350 U. S. 523, 76 S. Ct. 608 (1956) ---------- 10

Shenker vs. Baltimore & Ohio Railroad Co., U. S. 1 (1963), 83 S. Ct. 1667 (1963) ---------- 12

Southern Railway-Carolina Division Co. vs. Bennett, 233 U. S. 80, 34 S. Ct. 566 ---------- 15-16, 19

Southern Railway Co. vs. Deer, 240 F. 73 (CA 6, 1917) ---------- 16

Stone vs. N. Y. C. and St. L. R. Co., 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441 ---------- 10

Sweeney vs. Erving, 228 U. S. 233 ---------- 19

Taylor vs. Reading, 83 F. Supp. 804 (1949) ---------- 22

Tennant vs. Peoria & P. U. R. Co., 321 U. S. 29 ---------- 10, 13

Union Pacific Co. vs. Hadley, 246 U. S. 330, 38 S. Ct. 318 (1918) ---------- 23

Weigand vs. Pennsylvania Railroad Co., 267 F. 2d 281 (1959) ---------- 16

Constitutions.

Constitution of Ohio, Article IV, Section 2 ---------- 2

Statutes.

Federal Employers' Liability Act, Section 1 (45 U. S. C. A., 51) ---------- 4, 23

Federal Employers' Liability Act, Section 6 (45 U. S. C. A., 56) ---------- 4

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. ----------

HENRY THOMAS BAILEY,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District of Ohio.

OPINIONS BY COURTS BELOW.

The petitioner, Henry Thomas Bailey, respectfully prays that a writ of certiorari be issued to the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, to review the judgment and decision of that Court in Case No. 26;738 entitled *Henry Thomas Bailey vs. The New York Central Railroad Company.* On April 15, 1964, the Court of Appeals affirmed a judgment of the Court of Common Pleas of Cuyahoga County in defendant's favor rendered by the Trial Court upon a motion by defendant at the conclusion of plaintiff's case, to direct a verdict on behalf of the New York Central Railroad. The judgment journal entry of the Court of Appeals dated April 15, 1964, is appended hereto as Appendix B. The memorandum to counsel written by Judge Charles White in the Trial Court, in which he granted defendant's mo-

tion for a directed verdict is attached to this Petition as Appendix A. The Court of Appeals rendered no opinion.

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review of constitutional questions under the Constitution of the State of Ohio and of the United States, pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. A review by that Court is discretionary upon the ground that the case is (1) "One of public or great general interest," or that a debatable constitutional question is involved. The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. The Supreme Court of Ohio refused to take jurisdiction of the cause and issued orders overruling petitioner's motion to certify, and determined that no debatable constitutional question was presented by the judgment of the Trial Court as affirmed by the Court of Appeals. Thus, all remedies available through the State Judicial System of the State of Ohio have been exhausted by petitioner.

Under the law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, becomes the final judgment of the highest court of the State of Ohio in which a decision can be had. *Cuyahoga River Power Company vs. Northern Realty Company*, 244 U. S. 300, 37 S. Ct. 653.

JURISDICTION OF THIS COURT.

Jurisdiction of the Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the act of June 25, 1947, c. 646, 62 Stat., 929, Title 28 U. S. C. Sec. 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. *Was the order directing a verdict for the defendant because of alleged lack of evidence that defendant had neither actual nor constructive notice of any defect on the premises an invasion of plaintiff's constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A. 51 and particularly the right of plaintiff to have the jury weigh the sufficiency of the evidence in the light of prior pronouncements by this Court?*

2. *Has the Trial Court and the Court of Appeals the jurisdictional power to remove the instant cause from the jury by weighing the evidence and finding it insufficient on the issue of notice?*

3. *Did the Court of Appeals, by affirming without opinion the Trial Court's ruling, correctly determine the requirement of proof of notice in accordance with the Federal Employers' Liability Act, 45 U. S. C. A. 51?*

4. Must an injured employee within the coverage of the Federal Employers' Liability Act adduce specific proof of actual or constructive notice when the proofs support a finding that the premises were defective and under the exclusive control of employees other than the injured employee for maintenance purposes?

5. Did the Trial Court and Court of Appeals misconstrue petitioner's right as to a cause of action under Section 51 of 45 U. S. C. by narrowly restricting the issue as to whether or not the respondent railroad had actual or constructive notice that the light bulb was burned out?

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof. (Title 45 U. S. C., Section 51.)

Jurisdiction of the federal claim by the State Court is provided in Section 6 of the F. E. L. A. (Title 45 U. S. C., Section 56.)

The foregoing federal statutes are appended to this Petition as Appendix C.

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition, after the necessary allegations invoking the applicability to the Federal Employers' Liability Act, alleged negligence in the failure of the defendant to provide plaintiff a safe place to work, in failing to maintain the furnaces on the premises where plaintiff was working, and in failure to properly inspect and maintain the electric light bulb overhanging the steps that the plaintiff would have to descend in order to go to the cellar. Plaintiff further alleged that

by reason of such negligence and as a direct and proximate result thereof, he fell down the cellar steps when the light failed to go on, suffering severe injuries to his back; and an aggravation of a prior condition of cerebral arteriosclerosis and right hemiplegia secondary to cerebral thrombosis, which left him permanently impaired and disabled, and because of which he was unable to ever return to work.

As a result of all of these injuries, plaintiff prayed as damages the sum of Seventy-Five Thousand Dollars ($75,000.00).

Defendant, by its answer, admitted the employment of plaintiff and admitted that the plaintiff had fallen while on a stairway leading from the main floor of the dormitory where he was working to the boiler room area, when the overhanging light did not go on. Respondent thereupon employed in its answer to plaintiff's Petition an affirmative defense of sole negligence which was denied by a reply. The pleadings on which the issues were joined, specifically the Petition of petitioner, respondent's answer and the reply of petitioner, are all appended hereto, Appendix D, E, and F.

It is important to note that the only basis for the Trial Court's ruling in favor of respondent was that contained in the Trial Court's memorandum to counsel, appended hereto as Appendix A. The Trial Court said, in effect, that since respondent had no actual or constructive notice of the defective light, petitioner had failed to make out a jury case and accordingly, judgment was directed for defendant. "There is no evidence that defendant had either actual or constructive notice of any defect on the premises in question."

It is also significant to note that it was never disputed throughout the presentation of plaintiff's case that the

dormitory where plaintiff worked was at all times under the control and maintenance of the defendant, and similarly, that the plaintiff was employed by defendant as a janitor-porter in the dormitory where the accident occurred, performing work substantially in furtherance of interstate commerce within the coverage of the F. E. L. A.

The transcript of testimony which forms the basis of the record upon which a determination of the sufficiency of notice must be made will now be referred to in its important aspects in support of petitioner's claim that it was error to arrest his case from the jury. Numbers as they appear in parenthesis refer to page numbers in the typewritten transcript of testimony, i.e., the Bill of Exceptions as it was submitted to the Court of Appeals and to the Supreme Court of Ohio.

STATEMENT OF FACTS AND EVIDENCE.

This accident occurred on April 2, 1956, on the premises of the old Erie Depot operated and maintained by the respondent in Cleveland as a dormitory for incoming and outgoing dining car crews. On and prior to April 2, 1956, petitioner was an employee of the respondent, performing his duties generally as a janitor-porter.

Petitioner had been an employee of the respondent for some thirty (30) years in a variety of capacities. In 1950, he became the janitor-porter at the dormitory in Cleveland, having applied for the job following a slight cerebral stroke in 1948. The dormitory was under the control and maintenance of the respondent (R. 24, 25). Petitioner's duties generally were to check the crews in and out of the dormitory and to maintain a state of orderliness and cleanliness therein and to make beds (R. 310, 318). He had no duty with respect to lighting fixtures nor any work in that connection, including the changing of light bulbs

(R. 24, 34). The respondent employed electricians for all such electrical work which was under the supervision of the Superintendent of Buildings and Docks. It was the duty of the electrician employed by The New York Central Railroad Company to check electrical fixtures (R. 25, 34, 35, 218, 219, 325, 326). The dormitory and its electrical appurtenances and fixtures, including light bulbs, were customarily inspected once each week, and usually on a Monday, by the respondent's electrician (R. 34, 221, 291, 293). Petitioner's hours of duty were from 4:00 p. m. until midnight.

On the day in question, being a Monday, petitioner reported for duty at the usual hour. About 6:30 p. m., he received a complaint of excessive heat in the dormitory. He opened the doors and windows and turned the thermostat down. Other complaints followed, so that at about 8:30 p. m., he called the stationmaster's office and was informed that the office would try to do something about it, but that in the meantime, he should call The East Ohio Gas Company. This he did and the company promised to send a workman to the dormitory.

Petitioner's instructions were that if anything untoward should happen in the dormitory, he was to call Mr. Ryan, the superintendent of Dining Car Service and his immediate superior; if Mr. Ryan could not be reached, he was to call the stationmaster's office (R. 25, 26). At that hour of the evening petitioner did not have Mr. Ryan's residence telephone number.

When the time passed and the condition of overheating persisted, petitioner again called The East Ohio Gas Company; this was about 9:30 p. m. On that occasion, he was instructed to turn the thermostat down and to go to the basement and shut off the valve controlling the flow of gas. He was given instructions by the gas company

representative on how to locate the valve and how to operate the same. He proceeded to the door which was opened inward upon the stairway that led down to the basement; with his right hand he opened the door and with his left hand reached to his left and flicked the light switch, and he continued walking. The light did not come on. In the darkness, he fell as he completed his step (R. 30).

Mr. Bailey had been down that stairway on other occasions. About a month prior to the accident, he had occasion to go down there to look at a condition of flooding (R. 30 to 31). On every other occasion except the one on April 2, 1956, the lights came on when he flicked the switch (R. 31). He had never had occasion to use a flashlight (R. 31). The respondent furnished no flashlight for his use (R. 40, 41). No inspection of the premises had been made by respondent during his tour of duty that night.

Mr. Bailey never had occasion nor reason to check nor to change the light bulb over the stairway at any time during his duty at the dormitory (R. 34). Petitioner saw no loose light bulbs lying around the premises on the date of the accident (R. 35). The only bulbs that were available were in the electrician's toolbox which petitioner was not able to get into (R. 36).

As noted above, petitioner became permanently disabled as a result of this fall and remained unable to work from that time forth.

ARGUMENT.

Summary.

This Petition seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Petitioner had sought review from the Court of Appeals of Cuyahoga County upon the Trial Court's judgment in favor of respondent on the express ground of an insufficiency of evidence of constructive or actual notice. In absence of an opinion by the Court of Appeals, the Trial Court's memorandum becomes the only basis for the Trial Court's action and it is the Trial Court's opinion, therefore, which petitioner asks this Court to review and to judge.

Questions 1 and 2.

One of the early fundamental cases in which the United States Supreme Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey vs. Central Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit appellate court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or appellate courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Employers' Liability Act of an injured railroad employee to trial by jury.

While perhaps the standard of a "close or doubtful case" as pronounced in the *Bailey* case might be considered somewhat nebulous in determining the test of a jury case under the Act, it would certainly seem that after the pronouncement in *Rogers vs. Missouri Pacific R.R. Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case under the Act was prescribed. In the *Rogers* case, this Court made the now oft-quoted pronouncement:

> "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." (Emphasis added.)

For other cases emanating from this Court holding to the same principle, see *Lavender vs. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Tennant vs. Peoria & P.U.R. Co.*, 321 U. S. 29; *Schulz vs. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Gallick vs. The Baltimore & Ohio Railroad Co.*, 372 U. S. 108, 9 L. Ed. 2d 618 (1963); *Stone vs. N. Y. C. and St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed 441; *Carter vs. St. Andrews Bay R. Co.*, 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236; *Affolder vs. N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683; *Coray vs. Sou. Pac. R. Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Dennis vs. Denver & R. G. W. R. Co.*, 84 S. Ct. 291; and *Meeks vs. Georgia Southern & Florida Railway Co.*, 108 Ga. App. 808; 134 S. E. 2d 555; (S. Ct. No. 981, decided 6/1/64 by this Court).

In the case of *Basham vs. Pennsylvania Railroad Co.*, 83 S. Ct. 965 (1963), where petitioner's version of the accident was disputed by respondent's expert testimony that the accident could not possibly have happened in that par-

ticular way, this Court held, as noted in headnote number 2:

> "If there is an evidentiary basis for a verdict in favor of a railroad employee in a suit under the Federal Employers' Liability Act for injuries sustained in the course of his employment, it is error for trial and appellate courts to re-evaluate conflicting evidence and mandate a result opposite of that reached by the jury."

The reading of these cases makes it abundantly clear, therefore, that if there was *any* evidence of even the "slightest" degree of employer negligence, i.e., failure to maintain a correctly functioning furnace and/or light fixture, a directed verdict does violence to the constitutional rights of plaintiff to a trial by jury in a case under the F. E. L. A., and such a directed verdict is contrary to the pronounced law of this Court in decisions similar to those quoted above.

The record in the instant case is replete with examples of negligence on the part of respondent, based primarily on the testimony of petitioner. In accordance with the *Basham* case, *supra*, petitioner's testimony alone should be sufficient to create a question to be resolved by a jury. The Trial Court itself recognized this when, before respondent's motion for directed verdict, the Court overruled respondent's motion to strike petitioner's third, fourth and sixth specifications of negligence finding "* * * that there is evidence from which the jury may draw permissible inference of an admission * * *." (R. 392.)

In analyzing the pertinent portions of the Trial Court's memorandum to counsel (Appendix A), this Court will note a concluding paragraph of Trial Judge White, in which the following was stated:

> "* * * if an inspection was made of the premises during the day on Monday, April 2, 1956, it is common knowledge that the light bulb could have burned out at anytime between the conclusion of the inspection and 10:30 p. m. that same day."

It is obvious that in this case, the Trial Court has presumptively made an assumption which a jury might or might not have made. The Trial Court, in other words, assumed without any evidence offered by respondent, that the light bulb could have burned out *even if* it was checked that day (*and there was no evidence by defendant regarding any inspection on that day*).

This is an assumption which a jury should have been given the opportunity to make or to discard, in accordance with cases cited above, and in light of what constitutes a jury case under the F. E. L. A. as noted by the Federal Courts. Under the most recent interpretations of cases arising under F. E. L. A., as for example, *Carney vs. Pittsburgh & Lake Erie Railroad Co.*, 316 F. 2d 277 (1963), and *Shenker vs. Baltimore & Ohio Railroad Co.*, U. S. 1 (1963) S. Ct. 1667 (1963), it was held that the railroad has a "nondelegable duty to provide its employees with a safe place to work, even when they are required to go onto premises of a third party over which the railroad has no control." (*Shenker vs. Baltimore & Ohio, supra.*)

There is no qualification here that the "non-delegable duty to provide its employees with a safe place to work" is in any way qualified by the proviso that notice, actual or constructive, must be shown, even where, as in the *Shenker* case, the employee was on the premises of a third party over which his employer had no control, and where the railroad had no actual or constructive notice of the defective mail car door of the P. & L. E. train.

In view of the fact that petitioner testified that the

duty of inspecting and maintaining the gas furnace and light fixture was strictly that of respondent, and that he, petitioner, had no responsibility to maintain or supervise the functioning of the gas furnace or light fixtures, and in light of petitioner's testimony that he was performing his stated duty as a janitor-porter in trying to correct the overheated condition, the jury had the very definite right to "select from among conflicting inferences and conclusions that which it considers most reasonable * * *." (*Tennant, Adm'x. vs. Peoria & P. U. Railway, supra.*) In other words, the jury in the instant case had a right to conclude that the respondent railroad had failed to make its usual inspection of the fixtures, or in making the inspection had done so inadequately, because had the inspection been carried out as it should have been carried out then the gas furnace would not have malfunctioned and the light bulb would have worked. Petitioner then would not have had to descend a darkened, hazardous stairway in order to correct a malfunctioning furnace. At least these inferences could have been selected by the jury had they been given the opportunity to make the selection.

Questions 3 and 4.

In the light of two very recent federal cases, the requirement of specifically showing notice in certain F. E. L. A. actions has been nullified. In the instant case, therefore, the Court of Appeals incorrectly determined the requirement of proof of notice in accordance with the cases to be cited below. These cases hold that where the instrumentality or instrumentalities causing the injuries were, at the time and prior thereto, under the control, maintenance and supervision of the respondent, or if the premises were defective and not reasonably safe and under the exclusive control of the railroad for maintenance purposes,

then notice can be inferred by the jury. We refer specifically to the cases of *Miller vs. Cincinnati, N. O. T. Pacific Railroad Co.*, 317 F. 2d 693 (6th Circuit of Ohio, 1963) and *Fassbinder vs. Pennsylvania R. R. Co.*, 322 F. 2d 859 (3rd Circuit of Pennsylvania, 1963). The *Fassbinder* case is especially significant because the 1963 decision overruled the original case in the District Court (*Fassbinder vs. Penna. R. R. Co.*, 193 F. Supp. 767) (1961), which the lower Court, in the instant case, heavily relied upon in justifying its ruling in favor of respondent.

In both the *Miller* and *Fassbinder* cases, the Court relied upon the doctrine of *res ipsa loquitur* and stated, in effect, that this doctrine justified a jury in inferring that respondent had either actual or constructive notice of a defect based upon the mere happening of the accident, where maintenance of the defective premises is under the control of employees of defendant other than petitioner.

The facts in the *Miller* case are worth examining so that the full significance of the Court's holding in its relationship to the present case can be more fully understood. In the *Miller* case, the plaintiff was returning a fire hose nozzle to its bracket and while doing so, he injured his right arm when the nozzle became disengaged from the bracket from an unknown cause. Without the trigger even being pressed, there was a high pressure discharge of water which caused the nozzle to become disengaged, whereby plaintiff was injured.

There was expert testimony that the nozzle was defective and the defendant agreed to the existence of the defect, but the defendant argued that there was no proof that the defect was known or should have been known by the defendant nor that they had any opportunity to correct the defect.

Thus, in its allegation of having no notice of the de-

fect nor of having the opportunity to correct the defect, the position of the defendant in that case was similar to the position of the respondent in this case, which also claims that it had no notice of the burned out light bulb and no opportunity to correct the light bulb if it had, in fact, burned out before the accident.

The issues presented in the *Miller* case were similar, therefore, to the issue in the case at bar, to-wit: Was there sufficient evidence from which a jury could find that the defendant had actual or constructive notice of the defective condition with the fire hose nozzle?

A second subsidiary issue was whether the doctrine of *res ipsa loquitur* applied?

In the *Miller* case, Judge O'Sullivan stated "the establishment of such an element (notice) * * * may come from proof of facts permitting a jury inference that the defect was discovered, or should have been discovered, by the exercise of reasonable care or inspection. 56 C. J. S. *Master and Servant*, Section 248, page 1002."

In other words, the Court was stating, in effect, that the fact the defect existed on that date of the accident was in itself sufficient to create a jury issue as to the question of notice as long as the instrumentality was under defendant's control.

In discussing the application of *res ipsa loquitur* to F. E. L. A. cases, the Court stated as follows:

> "An issue on notice was made solely on *res ipsa loquitur* which is applicable to actions under the F. E. L. A."

The Court then cited the following authorities, all of which hold to the same general principle that the notice issue was determined wholly by *res ipsa loquitur* which is applied to F. E. L. A. actions: *Southern Railway-Caro-*

lina Division Co. vs. Bennett, 233 U. S. 80, 34 S. Ct. 566; *Southern Railway Co. vs. Deer*, 240 F. 73 (CA 6, 1917); *Baltimore & Ohio R. R. Co. vs. Kast*, 299 F. 419 (CA 6, 1924), Cert. denied 266 U. S. 613, 45 S. Ct. 95, 69 L. Ed. 468; *Didinger vs. Pa. R. R. Co.*, 39 F. 2d 798 (CA 6, 1930); *Chesapeake & Ohio R. R. Co. vs. Smith*, 42 F. 2d 111 (CA 6, 1930), Cert. denied 282 U. S. 856, 51 S. Ct. 32; *Lowery vs. Hocking Valley R. R. Co.*, 60 F. 2d 78 (CA 6, 1932); *Carpenter vs. Baltimore & Ohio R. R. Co.*, 109 F. 2d 375 (CA 6, 1940); and *Nashville C. & St. L. Railroad Co. vs. York*, 127 F. 2d 606 (CA 6, 1942).

An extensive annotation on the applicability of the doctrine of *res ipsa loquitur* to actions arising under the Federal Employers' Liability Act is contained in 35 ALR 2d 478 et seq. On page 513 of this annotation is a long list of cases holding that the doctrine of *res ipsa loquitur* has been held applicable on the ground that the injury was caused by a defect in defendant's maintenance of the place of accident exclusively in its control. It is noted in this annotation that a dangerous condition of the premises will support the application of the doctrine (35 ALR 2d 521 et seq.). Thus, the doctrine applies to defective conditions of the premises as well as to defective appliances as long as the appliances or premises are under the exclusive possession, management and control of defendant, as they are in the instant case.

Included in this annotation are some of the cases cited by the 6th Circuit in the *Miller* case, which support the principle that defective premises give rise to the application of *res ipsa loquitur* as long as these premises are under the control and management of defendant. Specific reference is made to the cases of *B & O Railroad Co. vs. Flechtner*, 300 F. 318 (1924); and *Weigand vs. Pennsylvania Railroad Co.*, 267 F. 2d 281 (1959).

The 6th Circuit in the *Miller* case was very definite that in holding the doctrine of *res ipsa loquitur* applicable to F. E. L. A. cases, the element of notice could be inferred at the same time that *res ipsa loquitur* was applied. In the Court's words:

> "* * * as stated in *Sweeney vs. Erving*, 228 U. S. 233, 240 33 S. Ct. 416, 418, 57 L. Ed. 815, 819, * * * *res ipsa loquitur* means that the facts of the occurrence warrant the inference of *negligence* * * * (Emphasis added.)
>
> Application of the doctrine permits an inference of negligence, such inference must necessarily include all the essential elements of negligence including here an inference that defendant had actual or constructive knowledge of the defective condition of the nozzle."

In the same *Miller* case, the Court referred to the *Carpenter* case, *supra*, and stated that "the falling of the weight under the circumstances of this case in itself, was some substantial evidence of negligence on the part of the appellee." Reference was then made to *Restatement of the Law*, Agency 2d, Section 503, where in regard to the doctrine of *res ipsa loquitur*, the author says as follows:

> "The existence of a defect in a structure or instrumentality may of *itself* constitute evidence sufficient to warrant a finding that the master has *failed his duty of inspection.*" (Emphasis added.)

In the *Miller* case, *supra*, the Court also discussed the case of *Baltimore & Ohio Railroad Co. vs. O'Neil*, 211 F. 2d 190 (CA 6, 1954), reversed without opinion. In *O'Neil vs. Baltimore & Ohio Railroad Co.*, 348 U. S. 956, 75 S. Ct. 447, the new opinion supported the Court's holding in the *Miller* case, thereby indicating that the reversal was approved by Judge McAllister's original dissent in the *Baltimore & Ohio Railroad Company* case as reported in 211 F. 2d 190.

The facts in that case were as follows:

The plaintiff was injured by a breaking of a bolt. There was no direct evidence that the bolt was defective and the lower Court held that there was no evidence of notice *since the bolt was purchased new.* Judge McAllister's dissent included the following statement which has significance in the *Miller* case and, certainly, in the case at bar:

> "The rule of *res ipsa loquitur* creates an inference of fact. It casts on the opposite party the duty of going forward with evidence of risking that the jury will infer negligence from the occurrence * * *.
>
> * * * *it required a submission to the jury, since the mere fact that the bolt was new and unused was not such evidence that the inference of negligence could not stand against it* * *.*." (Emphasis added.)

Neither in the *O'Neil* case nor in the case at bar did defendant offer evidence of the previous condition of the defective light fixture or furnace, evidence of prior inspection of the premises or of the instrumentalities, nor evidence that they had been functioning prior to the date of the accident. In accordance with the *O'Neil* ruling as summarized in the *Miller* case, there can be no question but that defendant in this type of situation has the duty of going forward to offer evidence of the previous condition of the defective instrumentalities and of the premises where petitioner was working.

In the *Fassbinder* case, *supra,* plaintiff was injured in the course of his employment when he tried to close a railroad door which stuck because of a defective mechanism used to retain tension on the hand brake of the coach which is called a "dog." In its opinion, the Circuit Court held that the unusual accident was such as in the ordinary course of things would not have occurred if the defendant had used proper care. Therefore, the Circuit Court over-

ruled the District Court's holding that the case did not present a jury question and the upper Court held, in effect, that notice was an element that could be inferred by the jury and it was not necessary for the plaintiff to specifically prove actual or constructive notice in order to make out a jury question where defendant had control and supervision of the defective coach and "dog." Thus, the issue is squarely applicable to the issue in the instant case. As noted above, the *Fassbinder* case, in the lower Court, was heavily relied upon by the Trial Court, as well as by defense counsel, in supporting its motion for directed verdict. Since the *Fassbinder* case has been overruled, added weight has been lent to the theory propounded by petitioner herein, to-wit, *that where the instrumentality and the premises are under the control and supervision of the respondent, notice can be inferred by the jury and it need not be proven specifically by plaintiff.*

There can be no question but that this Court fully recognizes the applicability of *res ipsa loquitur* to cases arising under F. E. L. A. See, for example, *Jesenowski vs. Boston & Maine Railroad Co.*, 1947, 329 U. S. 452, 67 S. Ct. 401; *Sweeney vs. Erving, supra; Southern Railway Co. vs. Bennett, supra; O'Neil vs. B & O. R. R. Co., supra; Benner vs. Terminal R. Association*, 348 Mo. 928, 156 S. W. 2d 657, Cert. denied 315 U. S. 813, 62 S. Ct. 798; *Minneapolis & St. Louis R. R. Co. vs. Gotschall*, 244 U. S. 66, 37 S. Ct. 598 (1917). (Also see collected cases in 35 ALR 2d, pages 500 to 535.)

All the usual requirements necessary for the application of *res ipsa loquitur* are present in the instant case. First, the evidence is undisputed that the instrumentality causing the injury was "under the exclusive management and control of the respondent." Reference is made, for example, to the cross-examination of Sidney Morse, District Supervisor of Engineering and Electrical Maintenance for

respondent (R. 285-286), wherein he admitted that changing light bulbs on company property is normally claimed as electrician's work. (Petitioner as a janitor cannot, under union agreement, do the work of an electrician.)

There was also evidence by respondent that "routine maintenance procedure" was "to check this dormitory once a week, usually on a Monday if he was able to, and do such work as was found necessary in that check. *This was a standard practice that has been in effect for many years.*" (Emphasis added.) (R. 291.)

Petitioner, therefore, had the right to rely on the respondent electricians making their weekly maintenance checkups and to do whatever work was necessary, including the changing of light bulbs.

Not only was the instrumentality causing the injury under the exclusive management and control of the defendant as noted above, but the accident also occurred under such circumstances that in the ordinary course of events it would not occur if ordinary care were observed.

This was manifested by undisputed testimony that petitioner had been down the same steps on previous occasions, without mishap, and the light had always worked on those other occasions (R. 31). Since these lights were routinely checked and maintained by the respondent electricians, as noted above, there is a fair inference a jury could reasonably draw that on a night when this light did not go on the inspections had not been made or had been made in an inadequate manner.

It is important for this Court to note that on other occasions, when Mr. Bailey had gone down the steps to the basement, he always went down in the same manner that he went down on the day of the accident, to-wit: by continually walking through the door, switching on the light with one hand as he proceeded toward the steps (R. 37).

Thus, the jury could find on the basis of the direct examination of petitioner, that in the ordinary course of going down the cellar steps as he had done on other occasions, Mr. Bailey would not have fallen if the light would have gone on when he flipped the switch, as it had on other occasions.

Evidence is also abundant in the record that this accident was an unusual and extraordinary occurrence, and that the petitioner himself did not contribute to cause the defect in the lighting fixture or in the furnace and is not able to explain the cause of the breakdown in the fixture as well as respondent can.

He had never fallen before; the light had always gone on before, and the furnace had functioned without fault before; he performed his duties on this particular night as he had done on every other night in the past, and therefore, the failure of the light to go on and the malfunctioning of the furnace can truly be classified as unusual occurrences which brought about petitioner's accident.

The question of what is unusual or extraordinary depends upon the evidence adduced in each particular case. See *Herdman vs. Pennsylvania Railroad Co.*, 352 U. S. 518, 77 S. Ct. 4455 (1957).

Finally, in view of the evidence described above, that the maintenance and inspection of the light fixture was to be undertaken only by respondent, it must surely be admitted that respondent, through their agents, are more likely to be able to explain the reason for the failure of the light bulb and furnace to function than would be petitioner, whose job did not include the maintenance of the light fixture nor of the furnace, but only that of a "janitor-porter," to-wit: sweeping, keeping personnel comfortable, and registering people in and out of the dormitory (R. 310).

By no one's admission or standards did Bailey's pre-

scribed duties include the maintenance or inspection of lighting fixtures or the changing of light bulbs or the inspection or maintenance of the furnace in the cellar. If there was a question of a burned out fuse, or a burned out lightbulb, or defective wiring, or if there was some connection between the malfunctioning furnace and the defective lighting fixture, these would all be matters more likely to be explained by respondent who maintained these facilities than by petitioner who had absolutely no control or supervision over them.

The Federal Courts have also held, in applying the *res ipsa loquitur* doctrine, that the control over the defective instrumentality need not be solely in the hands of the one injured. As noted, for example, in the case of *Taylor vs. Reading*, 83 F. Supp. 804 (1949), "Exclusive physical control is not *sine qua non* for application of *res ipsa loquitur* in federal courts." Reference is also made, for example, to the *Jesenowski* case, *supra*, wherein the Court also stated that it was immaterial that "there was divided control of the offending instrumentality." See also *Allen vs. St. Louis-San Francisco R. R. Co.*, 297 S. W. 2d 483 (1956); *Marquadt vs. Kansis City Southern Railway Co.*, 358 S. W. 2d 49 (1962).

Of particular application to the instant case is headnote number 9, also in the *Marquadt* case:

> "Notice is not an ordinary requirement in a *res ipsa loquitur* instrumentality but that element is a matter of defense."

Thus, in the case at bar, it is up to respondent to prove whether they did or did not have notice and/or opportunity to correct, and whether inspection to examine or correct were or were not made.

In summary, therefore, to the argument on Question Nos. 3 and 4, we submit that the Court of Appeals and the Trial Court incorrectly determined the requirement of

proof of notice. The evidence was that the defective fixtures were under the direct control, maintenance and supervision of respondent, and since the accident was of a kind which would not have occurred if these instrumentalities had been properly maintained and inspected, and since the malfunctioning furnace and light were not brought about by any voluntary action on the part of petitioner, then the element of notice would not have to be specifically adduced by petitioner; it was a matter of defense for respondent, and a jury was warranted in finding the existence of actual or constructive notice on the part of respondent.

Question 5.

The Ohio Trial Court and Court of Appeals have misconstrued petitioner's rights as to a cause of action under Section 51 of 45 U. S. C., primarily by restricting the issue as to whether or not the respondent railroad had actual or constructive notice that the light bulb was burned out, so as to make the stairway unsafe to descend. *The correct issue is whether the proofs established that under the totality of existing facts and circumstances as a whole, there was evidence that the place of work was not reasonably safe.*

This Court has repeatedly held in actions under the Federal Employers' Liability Act that the jury has the right to search the evidence as a whole and give weight to factors and circumstances as a whole in determining whether the non-delegable continuing duty of providing a reasonably safe place to work has been complied with. See *Union Pacific Co. vs. Hadley*, 246 U. S. 330, 38 S. Ct. 318 (1918); *Bailey vs. Central Vermont Railway Co., supra; Blair vs. B & O Railway Co.*, 232 U. S. 600, 650 S. Ct. 545 (1945); *McBride vs. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Dennis vs. Den-*

ver and Rio Grande Western Railroad Co., 13 Utah 2d 249, 372 P. 2d 3, 375 U. S. 208; *Gulf, Colorado & Santa Fe Railway Co. vs. Deen*, 353 U. S. 925, 77 S. Ct. 678 (1957), and 358 U. S. 57, 79 S. Ct. 1 (1958); *Rogers vs. Missouri Pacific Railroad Co., supra.*

In fact, this Court has gone so far as to hold that where the jury specifically rejects in a special verdict, all and singular of the specific claims of negligence advanced by the injured employee, but nevertheless finds generally that the railroad failed to exercise reasonable care to provide a safe place to work, that it was prejudicial error to enter judgment for the railroad, and that judgment for the plaintiff should have been entered. See *Panhandle & Santa Fe Railroad Co. vs. Arnold*, 353 U. S. 360, 77 S. Ct. 840 (1957).

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that sufficient evidence warranting an inference of notice by the jury was adduced by petitioner in the presentation of his case. By affirming without opinion the ruling of the Trial Court in directing a verdict for respondent, the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference of negligence and, therefore, of the concomitant requirement of notice is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of petitioner to specifically prove actual or constructive notice on the part of respondent was in fact a usurpation of petitioner's right under the Federal Constitution as an employee in interstate commerce to a trial by jury. Determination as to the right to trial by jury has been construed by this

Court and required by it to have uniform application throughout the United States. Having examined the record, the duty of the Court of Appeals became that of reversing the judgment entered by the Trial Court since there was sufficient evidence presented from which a jury would have been warranted in finding the requisite element of actual or constructive notice by respondent.

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays this Court that his Petition for Writ of Certiorari to the Court of Appeals for Cuyahoga County, Eighth Judicial District of Ohio, be granted by the Supreme Court of the United States; that judgment be thereupon entered by the Supreme Court of the United States as a reversal of the judgment of the Court of Appeals of Cuyahoga County; that this Court issue a mandate to the Court of Appeals for Cuyahoga County to accordingly reverse judgment for respondent and grant a new trial for petitioner.

Respectfully submitted,

M. I. NURENBERG and
M. L. HELLER,
Counsel for Petitioner.

APPENDIX A.

MEMORANDUM TO COUNSEL BY LOWER COURT.

(Filed 9/13/63.)

CHARLES W. WHITE, *J.*:

This is an action by favor of the Federal Employers' Liability Act.

At the close of plaintiff's case defendant moves for a directed verdict on the express ground that there is no evidence that defendant had either actual or constructive notice of any defect on the premises in question.

On April 2, 1956, and before, plaintiff was an employee of the defendant as a janitor-porter at a dormitory operated and maintained by the defendant in Cleveland for incoming and outgoing dining car crews. On that date defendant fell in the dark on a stairway in the dormitory while attempting to go to the basement room and cut off the flow of gas to an overheated furnace. He charged the defendant was negligent in:

1. Failing to provide a lighted stairway for his use;

2. Failing to warn of the absence of lighting on the stairway;

3. Failing to seasonably inspect, discover and repair the darkened condition of the stairway;

4. Failing to provide a properly functioning furnace;

5. Failing to exercise reasonable care to provide plaintiff with a safe place in which to work; and

6. Failing to seasonably inspect and maintain the gas furnace.

All of these specifications can, in the view of the Court, be summarized as a charge that defendant failed to

provide the plaintiff with a safe place in which to work.

The evidence adduced on behalf of the plaintiff, when given its most favorable intendment, tends to establish the following set of facts: Plaintiff had been an employee of the defendant for thirty (30) years in a variety of capacities. In 1950 he became the janitor-porter at the dormitory in Cleveland having applied for the job following a slight stroke in 1948. His duties generally were to check the crews in and out of the dormitory and to maintain a state of orderliness and cleanliness therein and to make beds. He had no duty with respect to lighting fixtures or work in that connection, including the changing of light bulbs. The defendant employed electricians for all such work under the supervision of the Superintendent of Buildings and Docks. The dormitory and its appurtenances were customarily inspected once each week and usually on a Monday. Plaintiff's hours of duty were from 4:00 P. M. to midnight.

On the day in question (being a Monday), plaintiff reported for duty at the usual hour. About 6:30 P. M. he received a complaint of excessive heat in the dormitory. He opened the doors and windows and turned the thermostat down. Other complaints followed so that at about 8:30 P. M. he called the Stationmaster's office and was informed that the office would try to do something about it but that in the meantime he should call the East Ohio Gas Company. This he did and the company promised to send a workman to the dormitory.

Plaintiff's instructions were that when anything untoward should happen in the dormitory he was to call Mr. Ryan, the Superintendent of Dining Car Service and his immediate superior; and that if Mr. Ryan could not be reached he was to call the Stationmaster's office. At that hour of the evening plaintiff did not have Mr. Ryan's residence telephone.

When time passed and the condition of overheating persisted, plaintiff again called the Gas Company about 9:30 P. M. On that occasion he was instructed to turn the thermostat down and to go to the basement and shut off the valve controlling the flow of gas. He was given directions by the Gas Company representative how to locate the valve and how to operate the same. He proceeded to the door which opens inward upon the wooden stairway with open risers leading to the basement. With his right hand he opened the door and with his left hand reached to his left and flicked the light switch. The light did not come on. In the darkness he fell at the same moment.

Plaintiff had been down that stairway on other occasions. About a month prior to his accident he had occasion to go down there to look at a condition of flooding. On every other occasion except the one on April 2, 1956, the light came on when he flicked the switch. He had never had occasion to use a flashlight. The defendant furnished no flashlight for his use. No inspection of the premises had been made during his tour of duty that night.

In support of its motion defendant cites a number of Federal Employers' Liability Act decisions, most of them being by United States Courts of Appeals.

In the case of *Fassbinder v. Pennsylvania Railroad Co.*, 193 F. Supp. 767 (1961), on motion by the railroad for a new trial, the District Court held that in the absence of proof of actual or constructive notice to the railroad of the defect in a coach, the employee, allegedly injured as a result of the defect, failed to establish his case under the Federal Employers' Liability Act. The Court pointed out that the action under the Federal Employers' Liability Act is one grounded upon negligence, that the basis of liability thereunder is, and still remains, negligence, and that subject to the qualifications which Congress has im-

ported into this Act, the term "negligence" as it appears in the Act "is founded on common law concepts of negligence and injury."

The Court added:

> "The common law concept of negligence and injury with respect to the duty of an employer to provide a safe place to work requires an employer to have actual or constructive notice of a defective condition before he can be charged with a violation of his duty," citing *Sano v. Pennsylvania R. R. Co.*, 282 F. 2d 936; (3 Cir., 1960); and *Dobson v. Grand Trunk Western R. R. Co.*, 238 F. 2d 545 (7 Cir., 1957).

The Court concluded that there being no proof of either actual or constructive notice plaintiff had failed to establish his case and a new trial was ordered.

Another of the cases cited by defendant in support of its motion is *Kaminski v. Chicago River & Indiana R. Co.*, 200 F. Rep. 2d 1 (7 Cir., 1952). In that case a conductor carrying a light fell through a hole in a customer's empty coal pit while walking along the track checking car numbers. The railroad had no actual or constructive knowledge of the condition which obtained upon its customer's premises. *Held*: Error for refusal to direct a verdict for defendant at the close of plaintiff's case.

The Court said, among other things:

> "The mere fact * * * that plaintiff sustained an injury does not render defendant liable. * * * Since the test of liability in this case is negligence, the burden of proving defendant's negligence was on the plaintiff. In other words, he must establish that some negligence of the defendant caused, in whole or in part, the injury of which he complains.
>
> "Here the evidence is that plaintiff himself had walked safely on this identical path or lane on many previous nights. He had looked at the lane and the

path he was traveling on the night in question and had noticed nothing unusual or unsafe. On that night he carried a light. He was watching where he was going and he could see where he was going. He testified that he saw nothing unusual or unsafe. He suddenly fell through the hole which he had never seen before. There was no evidence whatsoever in the record as to how long the hole had been in existence there. It could not have been in existence very long because plaintiff himself had walked safely and without observing any hole or any unsafe condition over the same path on previous nights. There is nothing in the record to indicate that the condition which caused plaintiff's fall had existed for more than a short time before the accident.

"Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence. The record in this case clearly establishes that such circumstances did not exist here. The only inference that can reasonably be drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition."

In *Atlantic Coast Line Railroad v. Collins*, 235 F. 2d 805 (4 Cir., 1956) (Cert. denied), wherein plaintiff injured his back while throwing a switch in the railroad yards the trial court refused a directed verdict for the defendant and it was held to be error. The sole question was whether there was sufficient evidence of negligence on the part of the railroad company to take the case from the jury. Plaintiff was a young man who had been in the

service of the company for several years, most of which time was spent as a switchman in the same yard. He reported for duty at 4:00 P. M. and the accident occurred at 7:00 P. M. The switching device was of a standard type, the operation of which was familiar to the plaintiff who had previously operated the same switch a dozen times before 4 and 7 o'clock without difficulty. Plaintiff's whole case was based upon his testimony that on the occasion of the injury "the switch was hard to operate."

The Court said, among other things:

"(The) testimony taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man; but speculation is not enough. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inference favoring the party whose case is attacked.' " citing *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29.

In *Schilling v. Delaware & H. R. Corporation*, 114 F. 2d 69 (2 Cir., 1940), paragraph 3 of the headnotes reads as follows:

"In order to render railroad liable for injury to brakeman who was run over when he caught his foot in space in tie which was composed of discarded rails welded together, the brakeman was required to prove either actual notice to railroad of defective condition of tie resulting from fact that cinder filling in tie had been washed out, or that the cinders had been washed out for sufficient length of time to charge railroad with constructive notice and duty to repair."

The Court said, among other things:

"As his day began at 4 o'clock that afternoon there was little on which the jury could have found that

the hole had been there long enough to charge the defendant with constructive notice and the duty to repair. Proof of actual notice was wholly lacking. One or the other must appear to make out actionable negligence for failure to repair."

A case of much interest is that of *Phillips v. Great Northern Railway Co.*, 100 N. W. 2d 765 (Minnesota Supreme Court 1960) on an issue whether the railroad failed to furnish a safe place to work because a light bulb had burned out. It was held to be reversible error to refuse a requested instruction as follows:

> "You are instructed that while defendant was under a continuing obligation to exercise ordinary care in providing plaintiff with a reasonably safe place to work, the mere fact that a light bulb was burned out at the time of the accident is not evidence of negligence on its part. Before you may find that defendant was at fault in this regard you must determine whether the evidence shows that defendant had a reasonable opportunity to replace the bulb and failed to do so."

The plaintiff in that case was a freight car repairman. He and other members of his crew went to lunch about 7:30 P.M. When they returned to work the foreman turned on the lights. The lights were located on poles about thirty feet from the ground. The bulb on the pole nearest the car where plaintiff was working was out. It was burning the night before. No one in the crew had authority to replace the burned-out bulb, nor was there any facility to reach it. That work could only be done by electricians. The foreman made a report that the light was out, the only thing he could do. The accident happened not more than fifty-five minutes after it was discovered that the light was out.

The Court said:

> "In our opinion, whether defendant had a reasonable opportunity to replace the burnt-out bulb was properly a matter for the consideration of the jury in its determination of whether defendant was negligent in failing to furnish a safe place to work because of lack of sufficient light. We think that the court erred in refusing to give the requested instruction, or to include in its charge the substance of it if the language used was subject to criticism."

The most recent case having some bearing upon the instant subject is that of *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 317 F. 2d 693 (6 Cir., May 22, 1963) where the first headnote states as follows:

> "A railroad could not be held for negligence under the Federal Employers' Liability Act for a defective fire hose nozzle in absence of proof that the defect was known, or should have been known, by railroad with opportunity to correct it."

In the course of the opinion, it is said:

> "Defendant, however, properly argues that negligence cannot be predicated solely on the fact that the appliance was defective. (The action was not under the Safety Appliance Acts.) Under familiar law, defendant could not be convicted of negligence, absent of proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it."

The plaintiff here cites two cases as having an import contrary to that of the foregoing authorities. In *Beattie v. Elgin, Joliet and Eastern Ry. Co.*, 217 F. 2d 863 (7 Cir., 1955), a switchman complained of personal injuries sustained in a fall at his place of work. It was held that the question of whether presence of oil and grease at the place

of work created an unsafe place to work and caused plaintiff's fall and injuries and the question of defendant's knowledge, actual or constructive, of allegedly unsafe condition were for the jury. Under the circumstances of that case where there was some evidence that the unsafe condition had existed frequently and recurrently for some time and where the presence of grease and oil upon the sole and heel of a man's shoe was inevitable.

In *Chicago, Great Western Railway Co. v. Casura, et al.*, 234 F. 2d 441 (8 Cir., 1956), a switch foreman employed by the railroad was injured when a car moving on a spur track on a packer's premises came in contact with wooden gate while walking along the track. There was no evidence of notice but there was evidence that the condition causing the injury could have been discovered by timely inspection.

In passing, it may be noted that the Court has also examined the very recent case of *Gallick v. Baltimore & Ohio Railroad Co.*, 31 L. W. 4182 (2/19/63); 35 *Am. Jur.* 557, et seq.; 36 *Ohio Jur.* 2d 117, et seq.; and 2 *Cal. Jury Instructions* 1038 (No. 3034).

The foregoing authorities clearly point the way for the Court's decision in the instant case. Although it seems to have been assumed throughout the trial thus far that the electric light in question burned out, there is no evidence as to what the source of the defective condition actually was. While the ill-functioning gas furnace afforded the occasion for the plaintiff's attempt to go into the basement, it was not in and of itself a causal factor in the plaintiff's fall. If an inspection was made of the premises during the day on Monday, April 2, 1956, it is common knowledge that the light bulb could have burned out at any time between the conclusion of the inspection and 10:30 P.M. that same day.

The situation, therefore, is akin to that in the case of *Brady v. Southern Ry. Co.*; 320 U. S. 476, where the Court stated as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Accordingly, the motion for a directed verdict in favor of the defendant must be granted.

Plaintiff excepts. O. S. J.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 26,738.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

HENRY THOMAS BAILEY,
Plaintiff-Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD CO.,
Defendant-Appellee.

JOURNAL ENTRY.

Date: April 15, 1964:

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant, and therefore, the judgment of the Common Pleas Court is affirmed, and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

APPENDIX C.

STATUTES INVOLVED.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX D.

PETITION.

Now comes the plaintiff and for his cause of action says that at all times herein alleged and more specifically prior to and on April 2, 1956, defendant is and was a railroad corporation authorized to transact business under and by virtue of the laws of the State of Ohio; that as part of its business activities defendant operates a railroad common carrier of passengers and freight for hire, engaged in interstate and intrastate commerce; that pursuant to its operation as a common carrier at all times herein alleged defendant maintained for its train crews in the City of Cleveland, County of Cuyahoga and State of Ohio, a dormitory located at what was commonly known as the Old Erie Depot under the High Level Bridge in Cleveland, Ohio; that on April 2, 1956, and prior thereto, plaintiff was employed by defendant as a janitor-porter of said dormitory, which work substantially affected and was in furtherance of interstate commerce; that at all times herein alleged, and more specifically on April 2, 1956, both plaintiff and defendant were engaged in interstate commerce; that plaintiff's action is governed by and brought under an Act of Congress known as the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 through 59, and amendments thereto.

Plaintiff further says that on April 2, 1956, at approximately 10:30 P.M., he was on duty as a janitor-porter of defendant's dormitory as herein described; that at said time and place the gas furnace furnished by defendant to heat said dormitory was functioning improperly, thereby causing said dormitory to become overheated; that in connection with his occupational duties and in an attempt to correct said condition it was necessary for plaintiff to use a certain stairway leading from the main floor to the

boiler room provided, furnished and possessed by defendant within said dormitory; that the lighting of the stairwell of said stairway was not functioning at said time and place as the result of which plaintiff was caused to trip, stumble and fall, thereupon sustaining injuries to his person; that the maintenance of the lighting fixtures, lighting equipment and electrical wiring within the dormitory was at all times herein alleged under the possession, management and control of defendant and not the plaintiff.

Plaintiff further says that defendant was negligent in the following respects:

1. In failing to provide a lighted stairway for the use of plaintiff in the performance of his duties.

2. In failing to warn plaintiff of the absence of lighting on the stairway he was required to use to perform his duties.

3. In failing to seasonably inspect, discover and repair the darkened condition of said stairway which plaintiff was required to use.

4. In failing to provide a properly functioning gas furnace which necessitated the use of the dark stairway by plaintiff.

5. In failing to exercise reasonable care to provide plaintiff with a safe place in which to work.

6. In failing to seasonably inspect and maintain the gas furnace.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of the defendant, and as a direct and proximate result thereof, he was caused to trip, stumble and fall, thereupon sustaining injury to his person, consisting of a brain concussion and soft tissue injuries to his spine, knees and hips.

Plaintiff further says that said brain concussion was superimposed on a prior condition of cerebral arterio-

sclerosis and left hemiplegia secondary to cerebral thrombosis, causing same to become aggravated, activated and exacerbated.

Plaintiff further says that the soft tissue injuries to his cervical, dorsal and lumbar spine were superimposed upon pre-existing osteoarthritis, causing same to become aggravated, activated and exacerbated, and causing this plaintiff by reason of said injuries to suffer pain, disability, limitation in the use and function of his extremities and spine, and other disabilities to his person.

Plaintiff further says that he sustained a traumatic myofasciitis to the soft tissue structures adjacent to his spine.

Plaintiff further says that by reason of his injuries he has been forced to absent himself from his employment, thereby sustaining a loss of wages; that his ability to earn money has been permanently impaired.

Plaintiff further says that he now suffers and will suffer permanently from an inability to walk and get about.

Plaintiff further says that his injuries caused him to suffer nervous shock and great mental anguish, and he will suffer therefrom into the indefinite future.

By reason of which plaintiff has been injured and damaged in the sum of Seventy-Five Thousand Dollars ($75,000.00).

WHEREFORE, plaintiff prays judgment from the defendant herein in the sum of Seventy-Five Thousand Dollars ($75,000.00).

A. H. DUDNIK,

Attorney for Plaintiff.

APPENDIX E.

ANSWER.

First Defense.

Now comes the defendant, The New York Central Railroad Company, and for its answer to plaintiff's petition says that it is a railroad corporation organized under the laws of the State of Ohio and other states, doing business in Cuyahoga County, State of Ohio.

Defendant says that it maintains a dormitory in the City of Cleveland, Ohio, at what was commonly known as the Old Erie Depot under the High Level Bridge in Cleveland, Ohio.

Defendant says that on or about April 2, 1956, the plaintiff, Henry Thomas Bailey, was employed by it as a janitor-porter. Defendant says that on or about the third day of April, 1956, at 10:15 P. M., the plaintiff was found to have fallen while on a stairway leading from the main floor of the dormitory to the boiler room area.

Further answering, defendant denies each and every allegation or parts thereof in plaintiff's petition contained not hereinbefore specifically admitted to be true.

Second Defense.

For its second defense to plaintiff's petition, defendant incorporates and makes a part hereof the allegations, averments and denials of its first defense as though fully rewritten herein.

Defendant says that the injuries plaintiff complains of in his petition were solely and proximately caused by the negligence of the plaintiff himself.

Further answering, this defendant denies each and every other allegation or parts thereof contained not hereinbefore specifically admitted to be true.

WHEREFORE, having fully answered, defendant prays that it may go hence without day and recover its costs.

JOHN F. DOLAN,
JOSEPH T. RYAN,
Attorneys for the Defendant.

APPENDIX F.

REPLY.

Now comes the plaintiff and for his Reply to the first and second defenses contained in the Answer of defendant plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in plaintiff's Petition.

Specifically, plaintiff denies that he was solely negligent as alleged in the second defense of the defendant and denies that he was in any manner negligent in the premises.

WHEREFORE, plaintiff having fully replied prays for judgment as in his Petition he has prayed.

A. H. DUDNIK,
Attorney for Plaintiff.

Interrogatories Attached to Reply.

Now comes the plaintiff and propounds the following Interrogatories and requests that they be answered under oath by the defendant.

1. State whether at the time and place alleged defendant's dormitory at the Old Erie Depot was used by dining car personnel of defendant.

2. If the answer to Number 1 is "yes," state whether said personnel included cooks, waiters, stewards and chefs.

3. If the answer to Number 1 is "yes," state whether said personnel served on trains coming from states other than Ohio.

4. If the answer to Number 1 is "yes," state whether said personnel served on trains destined for states other than Ohio.

5. If the answer to Number 1 is "yes," state whether said personnel were compensated for their services by defendant and carried on the payroll records of defendant.

6. State whether defendant has a record as to the train numbers of the personnel sleeping at said dormitory on April 2, 1956 and April 3, 1956.

7. If the answer to Number 6 is "yes," state the name, address and employment classification of all such personnel sleeping at said dormitory on April 2, 1956 and April 3, 1956.

8. If the answer to Number 6 is "yes," state the train numbers on which said personnel were serving.

9. State whether the dining car personnel referred to in Number 1 were required as part of their employment duties to stay at said dormitory, for the convenience of this defendant.

10. State whether the beds were numbered at the dormitory commonly known as the Old Erie Depot as of April 2, 1956 and April 3, 1956.

11. State whether defendant maintains sign-in slips or other records identifying all personnel sleeping at the dormitory known as the Old Erie Depot, and the bed numbers being used as of April 2, 1956 and April 3, 1956.

12. If the answer to Number 11 is "yes," state the

name and address of the person ordinarily in possession and control of said record.

A. H. DUDNIK,
Attorney for Plaintiff.

APPENDIX G.

ANSWERS TO INTERROGATORIES.

The answers to the interrogatories propounded by the plaintiff are:

1. Yes.

2. Yes.

3. Yes.

4. Yes.

5. No. While performing work yes, but not while at dormitory.

6. Yes.

7. Defendant demurs to this Interrogatory as not being pertinent to any issue raised by the pleadings.

8. Defendant demurs to this Interrogatory as not being pertinent to any issue raised by the pleadings.

9. No.

10. Yes.

11. Yes.

12. The person now in control and in possession of said record is Mr. John F. Dolan, Assistant General Attorney, The New York Central Railroad Company, 1324 West Third Street, Cleveland 13, Ohio.

JOHN F. DOLAN,
JOSEPH T. RYAN,
Attorneys for the Defendant.